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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

EMELIA M. PASTERNAK,

Plaintiff,

vs.

TRANS UNION, LLC, EXPERIAN  
INFORMATION SOLUTIONS, INC.,  
EQUIFAX INFORMATION SERVICES,  
LLC, and CAPITAL ONE BANK, a  
national association,

Defendants.

No.: CV 07 4980 MJJ

**[PROPOSED] ORDER GRANTING  
CAPITAL ONE BANK'S MOTION  
TO DISMISS**

Date: February 12, 2008  
Time: 9:30 p.m.  
Courtroom: 11

Honorable Martin J. Jenkins

REED SMITH LLP  
A limited liability partnership formed in the State of Delaware

1                   **[PROPOSED] ORDER GRANTING DEFENDANT CAPITAL ONE'S**  
2                   **MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

3                   The Motion to Dismiss pursuant to Federal Rule of Civil Procedure  
4                   12(b)(6) filed by defendant Capital One Bank ("Capital One"), in the above-captioned  
5                   action came on for hearing on February 12, 2008, at 9:30 a.m. in Courtroom 11 of the  
6                   above-entitled Court, the Honorable Martin J. Jenkins presiding. Appearances were as  
7                   stated in the record.

8  
9                   After consideration of the pleadings, briefs and oral argument presented,  
10                  as well as all other matters presented to the Court, and good cause having been shown,  
11                  the Court GRANTS defendant Capital One's Motion to Dismiss pursuant to Rule  
12                  12(b)(6).

13  
14                   **BACKGROUND**

15                  Plaintiff Emelia M. Pasternak alleges that she was a victim of identity  
16                  theft. Plaintiff alleges that the identity thief used her information to apply for, and  
17                  obtain credit cards in Plaintiff's name from Capital One, as well as other credit card  
18                  issuers, and that Capital One continued to collect on the debt without conducting a  
19                  diligent investigation after Plaintiff notified it that she was a victim of identity theft.  
20                  Plaintiff filed this action on September 26, 2007 and filed a First Amended Complaint  
21                  ("FAC") on December 7, 2007.

22  
23                  Plaintiff's First Amended Complaint attempts to state three causes of  
24                  action against Capital One. The first is for violation of the Fair Credit Reporting Act  
25                  ("FCRA"), 15 U.S.C. § 1681s-2(b). The second is for violation of California Civil  
26                  Code § 1798.92. The third is a common law malicious prosecution claim. This Court

27                  ///

1 has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over the state law and  
2 common law claims against Capital One.

3  
4 Defendant Capital One has now moved to dismiss the FAC.

5  
6 **LEGAL STANDARD**

7 Under Federal Rule of Civil Procedure 12(b)(6), a district court must  
8 dismiss a complaint if it fails to state a claim upon which relief can be granted. The  
9 Court must assume that the plaintiff's allegations are true. *See Usher v. City of Los*  
10 *Angeles*, 828 F. 2d 556, 561 (9th Cir. 1987).

11  
12 **ANALYSIS**

13 In the FAC, Plaintiff alleges that Capital One issued a credit card to the  
14 identity thief in Plaintiff's name, and subsequently continued to collect on the debt  
15 without conducting a diligent investigation after Plaintiff notified it that she was a  
16 victim of identity theft. Capital One moves to dismiss all claims against it.

17  
18 **I. Third Cause of Action: Violation of 15 U.S.C. 1681s-2(b)**

19  
20 Plaintiff's third cause of action attempts to state a claim for violation of  
21 the FCRA against Capital One. 15 U.S.C. § 1681s-2(b). Capital One argues that  
22 Plaintiff's section 1681s-2(b) claim is defective because the facts alleged are  
23 insufficient to sustain a cause of action under the statute. Under the U.S. Supreme  
24 Court's recent reading of Rule 8(a)(2), Plaintiff's claims under 15 U.S.C. 1691s-2(b)  
25 are not well-pleaded and should be dismissed. *Bel Atlantic Corp. v. Twombly*, 127 S.  
26 Ct. 1955 (2007). Plaintiff's allegations are a "formulaic recitation of the elements,"  
27 which the Supreme Court has found unacceptable. *Bell Atlantic*, 127 S. Ct. at 1964-  
28

65. Merely alleging that a defendant has violated a statute does not show a plausible “entitled to relief.” *Id.* Indeed, Plaintiff failed to even specify any information as to the nature of the “inaccurate information” that Capital One has allegedly failed to modify, delete or permanently block. Moreover, Plaintiff’s claims fail because the factual allegations are also insufficient to support Capital One’s willful non-compliance with the FCRA. *Howard v. Blue Ridge Bank*, 371 F. Supp. 2d 1139, 1143 (N.D. Cal. 2005).

The Court, therefore, DISMISSES Plaintiff’s section 1681s-2(b) claim.

## **II. Fifth Cause of Action: Violation of California Civil Code § 1798.92**

The FCRA contains an express preemption clause, which states in pertinent part: “No requirement or prohibition may be imposed under the laws of any State (1) with respect to the subject matter regulated under ...(F) section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies.” 15 U.S.C. § 1681t(b)(1)(F).

California Civil Code section 1798.92 concerns duties of a claimant when a consumer notifies the claimant of the alleged identity theft. Cal. Civ. Code § 1798.92. This section tracks the prohibitions under section 1681s-2(a)(6). Similarly, the conduct which forms the basis of a violation of section 1798.92 also implicates section 1681m(f) of the FCRA. Section 1681t(b)(F) specifically preempts state laws with respect to conduct required under section 1681m(f).

Accordingly, the Court GRANTS Capital One’s motion to dismiss Plaintiff’s claim for violation of California Civil Code section 1798.92.

### III. Sixth Cause of Action: Malicious Prosecution

Plaintiff also alleges a claim for malicious prosecution based on an earlier action filed by Capital One and its collection attorneys, Patenaude & Felix, in California state court. Plaintiff alleges that the earlier action was dismissed by Capital One.

In order to establish a malicious prosecution claim, the plaintiff must establish: (1) a favorable termination; (2) on the merits; (3) the lawsuit was brought without probable cause; and (4) the lawsuit was initiated with malice. *Contemporary Servs. Corp. v. Staff Pro. Inc.*, 2007 WL 1829341, \*8 (Cal. App. June 27, 2007); *Robbins v. Blecher*, 52 Cal. App. 4th 886, 893 (1997).

Defendant Capital One argues that a dismissal does not constitute a favorable termination on the merits and that the termination “must reflect the merits of the action and the plaintiff’s innocence of the misconduct alleged in the lawsuit.” *Pender v. Radin*, 23 Cal. App. 4th 1807, 1814 (1994); *Sierra Club Found. v. Graham*, 72 Cal. App. 4th 1135, 1148-49 (1999); *Chauncey v. Neims*, 182 Cal. App. 3d 967, 978 (1986). Since Plaintiff only alleges that Capital One dismissed the action and provides no other allegations regarding a determination of the merits of the case or of Plaintiff’s innocence, Plaintiff cannot satisfy the requirement of a favorable termination on the merits.

Since Plaintiff cannot establish a favorable termination on the merits, which is required to bring a malicious prosecution claim, the Court DISMISSES Plaintiff’s malicious prosecution claim.

**CONCLUSION**

For the foregoing reasons and for good cause shown, the Court hereby GRANTS in its entirety defendant Capital One's Motion to Dismiss the First Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and the First Amended Complaint is DISMISSED WITH PREJUDICE in its entirety and without leave to amend.

IT IS SO ORDERED.

DATED: \_\_\_\_\_

\_\_\_\_\_  
Honorable Martin J. Jenkins  
United States District Court Judge

REED SMITH LLP  
A limited liability partnership formed in the State of Delaware

**PROOF OF SERVICE**

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 355 South Grand Avenue, Suite 2900, Los Angeles, CA 90071-1514. On January 8, 2008, I served the following document(s) by the method indicated below:

**[PROPOSED] ORDER GRANTING CAPITAL ONE BANK'S MOTION TO DISMISS**

- ☒ On the recipients designated on the Transaction Receipt located on the CM/ECF website.
- ☒ **FEDERAL: I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.**

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 8, 2008 at Los Angeles, California.

/s/ Davina Bernal  
Davina Bernal